

SUSAN DELLES ET AL.

IBLA 81-585

Decided August 31, 1982

Appeal from decision of Medford District Office, Oregon, Bureau of Land Management, denying protest of proposed aerial herbicide spraying of unit 518 in 1981 vegetative management program. OR 110-81-83.

Dismissed.

1. Administrative Authority: Generally--Appeals--Public Lands:
Administration--Rules of Practice: Appeals: Generally

The Board of Land Appeals must defer to the Secretary's decision to allow herbicidal spraying for vegetative management purposes, and the Board has no jurisdictional authority to entertain appeals concerning matters covered by the Secretarial action except in the limited circumstance where the appellant's object clearly is to show BLM's noncompliance therewith.

APPEARANCES: Susan Delles, Mr. and Mrs. Charles E. Kuehl, David E. Wise, and Mr. and Mrs. James A. Davis, pro sese; Eugene A. Briggs, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Susan Delles, Mr. and Mrs. Charles E. Kuehl, David E. Wise, and Mr. and Mrs. James A. Davis have appealed from a decision of the Medford District Office, Oregon, Bureau of Land Management (BLM), dated March 24, 1981, denying a protest of the proposed aerial herbicide spraying of unit 518 within the Rogue Resource Area as part of the 1981 vegetative management program.

On March 3, 1981, the BLM district manager adopted the proposed 1981 program for vegetative management, as set forth in a Supplemental Environmental Assessment (SEA), subject to certain changes. The SEA had been prepared in order to assess the environmental consequences of the use of herbicides and alternative methods of vegetation management, on a site specific basis, in the context of the analysis provided in a final Environmental Impact Statement (EIS), entitled Vegetation Management with Herbicides: Western Oregon, 1978 through 1987.

The 1981 vegetative management program, as adopted, called for the aerial fall spraying of 12 acres of land in unit 518 with Atrazine, for the purpose of controlling annual grasses. On March 12, 1981, appellant Susan Delles filed a protest of the proposed aerial spraying, contending that:

It is my sincere feeling that this unit is too close to a populated area for aerial spraying. One family lives within 500 ft and others within 1/2 mile could catch downward water flow and drift. Concern has been expressed for well water safety and domestic animals and children who might be near the area.

She requested that BLM "eliminate this unit from your 1981 fall spray program."

In the March 24 decision, the BLM district manager refused to eliminate unit 518 from the fall spraying program, stating that:

It is our position that this treatment is safe when implemented with our normal project design features. These features include wind, temperature and relative humidity constraints. When a unit is close to a residence, a 500 foot no spray buffer is required and we would not spray if the wind is blowing in the direction of the residence. The buffers along running water are included to minimize the chance for spray entering the water. Unit 518 does not normally have a late summer and fall stream flow from it. This unit is planned for a fall treatment.

In their statement of reasons for appeal, appellants contend that aerial spraying poses a potential threat to local residents and passers-by due to air and water "contamination" owing to drift and runoff of herbicides from unit 518. They note that the "James Davis, David Wise and Chuck Kuehl residences are all within 1/2 mile from the unit" and that the Sykes Creek road runs close to the unit. Appellants question the safe implementation of the "normal project design features," pointing to "the 1981 spring spraying of units in West Fork and Pleasant Creek drainages when rain was imminent." They also state that a fall spraying might coincide with the "rainy season," which "could wash the chemicals out of the soil."

By letter dated May 12, 1981, the Office of the Regional Solicitor requested that we dismiss the appeal on the basis that the Board lacks jurisdiction to entertain an appeal from a BLM decision to use herbicides in the context of the EIS where such use has been approved by the Secretary of the Interior. On March 15, 1979, the Secretary, from among the options presented in the EIS, approved the option providing for use of herbicides other than Silvex. The Solicitor's Office quotes from an order, dated April 17, 1981, at pages 3-4, wherein we dismissed appeals filed by various citizen groups and individuals (IBLA 81-445, etc.) from the denial of protests of certain aspects of the SEA:

None of the issues that any of the appellants have raised takes any of the appeals outside the scope of the environmental analysis of the herbicide program contained in the EIS. For each site, BLM examined the need for vegetation control and the alternatives

for carrying out its management program. A BLM conclusion that the use of herbicides is the most appropriate means of control at a particular site based on an adequate examination of competing considerations, rather than use of a non-herbicide method, is consistent with the option approved by the Secretary of the Interior.

By letter dated May 27, 1981, appellant Susan Delles argues that the Board has jurisdiction to consider this appeal because the BLM district manager's decision to use herbicides, under circumstances not "known" at the time of the preparation of the EIS, cannot be "considered attributable to the Secretary's approval of the use of herbicides in general." To hold otherwise "would put the entire herbicide program beyond administrative review."

[1] The March 1979 decision by the Secretary concluded that the use of herbicides, other than Silvex, was an appropriate method of managing vegetation. In so concluding, the Secretary relied on the EIS, which considered, among other matters, the potential threat to human health from the use of herbicides and appropriate measures to minimize exposure to herbicides during and after aerial spraying. The risk of drift over adjacent areas from aerial spraying and the risk of herbicides being carried into streams by runoff from rainfall were explicitly considered in the EIS. Specific mitigating measures were determined to be both appropriate and adequate to preclude adverse impact on occupants of neighboring lands. Appellants have not established that either the impacts of the spraying of Unit 518 or the mitigating measures to be used are inconsistent with those projected in the EIS. The Board of Land Appeals has no jurisdiction over appeals from decisions which have been approved by the Secretary of the Interior. 43 CFR 4.410. Similarly, where a Secretarial order is the basis for action by an agency of this Department, the Board will only review the case for the purpose of deciding whether the order was properly applied and implemented. A.C.O.T.S., 60 IBLA 1 (1981); Texas Oil and Gas Corp., 46 IBLA 50 (1980).

In the absence of contrary evidence, we must assume that aerial spraying will proceed under the project controls designed to protect human health which were outlined in the EIS. Appellants' doubts concerning this assumption are based on inconclusive evidence and speculation. Appellants have made much of a perceived difference between the project design features as outlined in the EIS and in the SEA. In the EIS, at page 1-46, it states that aerial spraying "will be confined" to periods of certain weather conditions. Appellants point out that at page 8 of the SEA a change is noted to the effect that spraying operations would "usually" be prohibited when certain weather conditions exist. The response of BLM at page 60, item 30, of the SEA explains that aircraft operations not actually involving spraying, such as reconnaissance flights or flights between units, is permitted under those conditions, but actual spraying of herbicides is not permitted. Appellants have not shown that the vegetation management plan is violative of the Secretarial decision to utilize herbicides other than Silvex within the context of the EIS. 1/

1/ Engaging in aerial spraying operations under conditions other than those identified in the EIS under any circumstances would be outside the scope of the Secretarial decision.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Bruce R. Harris
Administrative Judge

